Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
	)	

Comments of
Free-Market Advocates Opposed to Internet Regulation

For 10 years officials at the Federal Communications Commission have told Americans that the Internet will "break" unless the agency steps in to keep it "free and open." All the while, the Internet's privately driven development has been vibrant, relentless and universal. Nevertheless, at points during this same period the Commission twice sought to encumber the Internet with restrictive common carrier-like, Net Neutrality regulations. In response to each of these actions, the DC Circuit twice struck down the agency's overreach. In the latest DC Circuit ruling – Verizon v. FCC[1] – the Court struck down the main thrust of the Commission's arguments, but found that the Commission had some authority under Section 706 of the Communications Act. The Commission has apparently undertaken the present Notice of Proposed Rulemaking to once again establish a regulatory regime in the absence of a market failure or a clear Congressional grant of authority.

The Internet *is* "free and open," making the vast "network of networks" an integral engine for societal growth, participatory democracy and global commerce. Its healthy development came primarily through the lack of government regulation, not because of it. Although the Court seems to have offered the FCC a very narrow pathway to impose some form of Net Neutrality regulation on the Internet, nothing demands that the FCC go forward with its present plans.

Sadly, the discussion on Net Neutrality has turned away from the subject of what the vast majority of American consumers actually want and need, and is now focused almost entirely on the demands of a minority of political activists. These political activists have argued for a decade that in the absence of immediate and pervasive federal regulation the broadband Internet will be destroyed by the very companies supplying it. Given the tremendous and continued organic growth of the ecosystem, this radical viewpoint is counterfactual on its face.

Over the past decade, Americans have witnessed in real time, under the rigors of the real-world, the real benefits of a minimal policy framework, which has enabled the

[1] *Verizon v. FCC*, 740 F.3d 623 (DC Cir.2014).

Internet's edge, core and end-users to simultaneously thrive and prosper. To this end, government involvement in the Internet should continue to follow that "light touch" regulatory path. Absent clear evidence of a market failure or demonstrable consumer harm, network management decisions should remain in the hands of the network engineers who are the real-world experts in charge of its many parts, and the free economy which has nimbly and generously financed its development. If network management were to end up looking like government-controlled phone-service infrastructure, the expertise offered by the engineers and the innovation offered by the free economy would be greatly diminished, and producers and consumers would both suffer harm.

The FCC should therefore avoid issuing new Net Neutrality regulations at this time. Instead, we urge the Commission to wait for Congress' guidance before proceeding further. Regardless of the DC Circuit's ruling, it would be wholly inappropriate for unelected FCC Commissioners – some of whom could be influenced in no small measure by the demands of a non-expert political faction – to step into the breach and create a massive new regulatory regime which will have profound effects not only on the communications industry itself, but also on virtually every aspect of our society and economy.

Section 706 Is Not Needed to Boost Broadband Deployment

The Internet that we know today was in its infancy when the Telecommunications Act of 1996 was signed into law by President Bill Clinton. Deregulatory by design,[2] the '96 Act guided the Internet's development by working to "preserve the vibrant and competitive free market that presently exists for the Internet…unfettered by Federal or State regulation."

This deregulatory focus has unfortunately changed. By 2010, the FCC had issued its first broadly applicable set of Net Neutrality regulations. Last January, though these regulations were largely rejected by the DC Circuit, the Court's ruling shifted the accepted contours of the underlying law in a manner that could open a narrow path for regulation. Here, the Court newly interpreted § 706[3] of the '96 Act to allow the FCC to adopt Net Neutrality rules as long as those rules boosted broadband deployment <u>and</u> did not impose common carrier obligations on ISPs. The present NPRM appears to be the FCC's response to the Court's ruling that regulation under § 706 may be permissible.

---

[2] *See House Report 104-458 – Telecommunications Act of 1996* ("…to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition…"), http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp104&sid=cp104EPYxj&refer=&r_n=hr458.104&item=&&&sel=TOC_0&.

[3] Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (*1996 Act*), as amended in relevant part by the Broadband Data Improvement Act (BDIA), Pub. L. No. 110-385, 122 Stat. 4096 (2008), is now codified in Title 47, Chapter 12 of the United States Code.

Should the FCC adopt the Court's regulatory roadmap, the effect of this change will be significant. Judge Laurence Silberman sees little limitation on this new authority, remarking in the Verizon ruling that:

> "[A]ny regulation that, in the FCC's judgment might arguably make the Internet 'better,' could increase demand. I do not see how this…prevents § 706 from being carte blanche to issue any regulation that the Commission might believe to be in the public interest."

Similarly, a broad array of industry observers from all parts of the ideological spectrum believe that the Court's ruling would likely provide the FCC with new and expansive powers to regulate Internet services well beyond just broadband infrastructure, such as "edge providers." To this end, FCC Commissioner Ajit Pai presents some interesting questions, stating in his NPRM dissent:

> "So if three members of the FCC think that more Americans would go online if they knew their information would be secure, could we impose cybersecurity and encryption standards on website operators? If three members of the FCC think that more Americans would purchase broadband if edge providers were prohibited from targeted advertising, could we impose Do Not Track regulations? Or if three members of the FCC think that more Americans would use the Internet if there were greater privacy protections, could we follow the European Union and impose right-to-be-forgotten mandates?" [4]

Although the DC Circuit ruling enables the FCC to use § 706 in novel ways, that need is not reflected in the healthy Internet marketplace. Industry statistics reveal that deployment of broadband infrastructure flourishes.[5] Nearly 96% of Americans have the choice of at least one wired, infrastructure-based broadband provider. Fully 88% have two or more choices. And 99% of Americans can choose at least one wireless broadband provider. Infrastructure growth is only increasing, and consumers are winning as a result.

Bearing this out, a recent letter to the FCC from 28 tech CEOs declares:

> "Today's regulatory framework helps support nearly 11 million jobs annually in the U.S. and has unleashed over $1.2 trillion dollars of investment in advanced wired and wireless broadband networks, as well as an entirely new apps economy. We see an average of over $60 billion poured into cable, fiber, fixed and mobile wireless, phone, and satellite broadband networks each and every year. And broadband gets better every year: the average broadband speeds jumped 25 percent

---

[4] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (NPRM), Dissenting Statement of Commissioner Ajit Pai.

[5] *See* US Telecom Association, Broadband Industry Stats, as accessed July 7, 2014, http://ustelecom.org/broadband-industry/broadband-industry-stats.

in 2013 alone, highlighting there are no slow lanes in today's Internet."[6]

Recent FCC analysis further supports this view, noting, among other things, that the number of connections with downstream speeds of at least 10 Mbps has increased by 118% over June 2012, to 103 million connections, including 58 million fixed connections and 45 million mobile connections.[7] This broad, positive trend – which continually produces more services, better offerings and lower prices – does not look to abate anytime soon.

With no evidence of market failure or consumer harm, the need to use § 706 to encourage broadband deployment remains unwarranted. The marketplace is healthy and does not need the government to intervene via new Net Neutrality rules to "fix" it.

Title II Would "Break" the Internet, Greatly Thwarting Broadband Deployment

Perhaps more disturbing than the FCC's § 706 proposals is the possibility that the FCC will use the NPRM to reclassify information services as old-fashioned, Title II common carrier services. The Commission should soundly reject this radical, investment-killing proposal as it has before.

Title II was the centerpiece of the Communications Act of 1934. It worked to encourage private investment in the phone system – infrastructure thought to be a "natural monopoly" because it was too big and expensive to cost-effectively duplicate. To attract infrastructure providers, the government would grant a monopoly to a single company in a given service territory. That grant, however, came at a cost. Although the company was protected from competition, and was guaranteed a return on its investment, the government micromanaged many aspects of the monopoly's infrastructure – including its rates, practices, services, investment and access to it – in order to ensure that end-users of this monopoly service remained protected.

80 years have passed since the '34 Act became law. Today, fewer than five percent of all U.S. households subscribe only to old-fashioned telephone service, which is strictly regulated under Title II. These landline-only subscribers dwindle with each passing year. At the same time, other less-regulated means of communications services continue their vibrant uptake. Not surprisingly, virtually all communications traffic crossing over our networks is IP-based information services, which see only light (or virtually no) regulation by the Act.

---

[6] *Twenty-Eight CEOs Argue Title II Classification Will Impede Investment and Job Creation* (Tech CEO Letter), May 13, 2014, http://www.broadbandforamerica.com/sites/default/files/CEOLettertoFCC-5.13.14.pdf.

[7] *FCC Releases New Data on Internet Access Services and Local Telephone Competition*, June 25, 2014, http://www.fcc.gov/document/fcc-releases-new-internet-access-and-local-telephone-services-data.

Unlike in the 1930's, today's "light touch" rules combined with the evolution of technology have continually expanded the field of new offerings and competitive entrants, converging the marketplace, and obliterating distinctions between providers at all layers of the ecosystem. Consequently, the "natural monopoly" – as well as the need to police communications companies as monopolies – no longer exists.

The deregulatory '96 Act did much to foster this. Taking its cue from that law, the FCC definitively moved the Internet away from Title II regulations when in 1998 then-FCC Chairman William Kennard rejected the same Title II arguments being made today, reporting to Congress that:

> "Classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."[8]

A Title II framework is even less appropriate today than it was in 1998. If the FCC brings information services under that authority, it opens up a Pandora's box of concerns, such as the potential for a host of new tariffs, reporting requirements, service obligations and state regulations, to mention just a few. Moreover, any business providing over-the-top services, including search, voice, video and email, would likely also come under Title II regulation, greatly undermining permissionless innovation that has done so much to drive the Internet's growth and development.

Reclassification would also expose Broadband Service Providers' property to mandated open access for "competing" third parties at unprofitable, government price-controlled rates. Should this occur, BSPs would rationally respond in the manner of risk-averse public utilities, as they would be forced to act not in the interests of their customers and shareholders, but in accordance with the interests of regulators, "consumer groups," and free-riding competitors.

Instead of boosting broadband deployment, Title II would stifle core infrastructure investment. With the core less willing to invest, take risk and grow, broad ecosystem innovation that depends on the core would be inhibited, too, thus harming consumers. The "virtuous circle" of Internet innovation would come unbound, frustrating Congress' foundational deployment goals.

Quite simply, Title II represents an outdated regulatory approach to infrastructure deployment that cannot serve the public interest. It was specifically rejected by the Commission in 2002, 2005, 2006, 2007, and 2010. Since then, the market has

---

[8] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45 (Report to Congress), para. 82 (1998), http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf.

become ever more vital and dynamic. Going ahead and imposing Title II, and then "forbearing" from it where it is deemed unnecessary, as some commenters have urged,[9] misses the point. The very act of imposing Title II is a radical departure from clearly articulated Congressional and FCC policy, and is a clear departure from a hugely beneficial, 43-year deregulatory trajectory in U.S. communications policy.[10] This needless, politically driven departure from a measurably beneficial policy would bring about years of legal battles and roil capital markets with investment-killing uncertainty.

The FCC must reject regulating information services under Title II. It will "break" the Internet.

Conclusion

In consideration of the vibrant Internet market of both service providers and over-the-top services, we submit that no market failure or real harm to consumers has been adequately demonstrated to support any expansion of FCC authority over the Internet. We urge Congress to act expeditiously in expressing its understanding of the proper role of the FCC in regard to regulating the Internet, and urge the FCC to wait for Congressional direction to that end.

Respectfully submitted,

Free-Market Advocates Opposed to Internet Regulation:

American Commitment
American Conservative Union
Americans for Prosperity
Americans for Tax Reform
Center for Individual Freedom
Digital Liberty
FreedomWorks
Institute for Liberty
Institute for Policy Innovation
Less Government
MediaFreedom
National Taxpayers Union
NetCompetition
Taxpayer Protection Alliance

---

[9] *Forbearance: What It Is, Why It's Essential to Net Neutrality*, Electronic Frontier Foundation, July 1, 2014, https://www.eff.org/deeplinks/2014/07/forbearance-what-it-why-its-essential-net-neutrality-0.

[10] *See Why Professor Crawford Has Title II Reclassification All Wrong*, Scott Cleland, Precursorblog, January 16, 2014, http://precursorblog.com/?q=content/why-professor-crawford-has-title-ii-reclassification-all-wrong.